IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 2, 2005 Session

PAUL TRUITT v. STEPHANIE PALMER, ET AL.

Direct Appeal from the Chancery Court for Davidson County
No. 01-789-I Irvin H. Kilcrease, Jr., Chancellor

No. M2003-02757-COA-R3-CV - Filed September 12, 2005

This appeal arises out of an action filed by the plaintiff seeking damages for breach of an oral contract, intentional misrepresentation, defamation, and conversion. The plaintiff voluntarily dismissed his claims against Dr. Michele Lutz. The trial court granted Dr. Michael Lutz's and West Meade Veterinary Clinic, LLC's motion for partial summary judgment, and the plaintiff voluntarily dismissed his remaining claims against Dr. Michael Lutz and West Meade Veterinary Clinic, LLC. The trial court granted Stephanie Palmer's, Palmer-West Meade Veterinary Clinic, Inc.'s, and West Meade Veterinary Clinic, PC's motion for partial summary judgment, leaving only the plaintiff's claim for unpaid bonuses or commissions. The trial court awarded the plaintiff $6,307.85, representing unpaid commissions and bonuses. The plaintiff now appeals to this Court, and, for the following reasons, we reverse and remand for further proceedings.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Jonathan C. Stewart, Nashville, TN, for Appellant

David E. High, Peter D. Heil, Nashville, TN, for Appellees Stephanie Palmer, and Palmer-WMVC, Inc., previously known as West Meade Veterinary Clinic, P.C.

OPINION

Facts and Procedural History

Dr. Paul Truitt ("Dr. Truitt" or "Appellant") is a doctor of veterinary medicine who, in the summer of 1998, performed some relief work for Dr. John McPeak ("Dr. McPeak"), the founder and owner of West Meade Veterinary Clinic, PC[1] ("West Meade"). Subsequently, Dr. McPeak passed away on December 7, 1998, and left West Meade to his daughter, Stephanie Palmer ("Palmer" or, collectively with West Meade, the "Appellees"). Palmer desired to sell West Meade, and she discussed this with Dr. Truitt in May and June 1999. Dr. Truitt did not wish to purchase West Meade immediately and decided to work at the clinic before making an offer.

The substance of the agreement between Palmer and Dr. Truitt is subject to dispute. Dr. Truitt's understanding was that he would be paid either $30 an hour or 30% of the gross revenue each month, whichever sum was greater. Dr. Truitt alleges that it was agreed he would be paid $5,000.00 per month and that the remaining $1,500.00 of his monthly salary would be applied toward building up equity in West Meade. Further, any sums earned above this $6,500.00 would be considered bonuses and applied toward building up equity in West Meade. Palmer contends that Dr. Truitt would have equity in the clinic only if the parties agreed on a purchase price for West Meade. No price for West Meade was agreed upon before Dr. Truitt began working for West Meade. Additionally, Palmer asserts that the agreement was Dr. Truitt would receive a monthly draw of $5,000.00 against payment of a 30% commission for gross services and 30% for net medicine provided to patients. The parties did not memorialize any agreement in writing.

Dr. Truitt began working for West Meade in July 1999. On September 24, 1999, Dr. Truitt received a folder from Palmer, containing calculations of Dr. Truitt's accumulated bonuses and the method for such calculations. Dr. Truitt did not agree with the calculations and scheduled a meeting with Palmer on September 28, 1999. In notes from that meeting with Dr. Truitt, as found in the record, it is stated that she is "willing to let accumulated income be put toward [the] purchase price at [the] rate [Dr. Truitt] wanted in [the] proposal." On Dr. Truitt's notes for the meeting, he has written that he will accumulate a minimum of $1,500.00 per month of equity in the clinic, but, when Palmer reviewed a copy of these notes, she crossed this notation out. However, Dr. Truitt testified that Palmer orally agreed to the $1,500.00 per month provision. Dr. Truitt's notes also state that, for any bonus amount over $6,500.00 per month, such amount would be credited to his accumulation of equity in the practice. In another set of notes from the September 28, 1999, meeting, Dr. Truitt wrote, at a time subsequent to the meeting, that his accumulated bonuses would either be applied to the purchase price of West Meade or refunded. After the meeting, Dr. Truitt continued working for West Meade as before.

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[1] West Meade Veterinary Clinic, PC later became Palmer-West Meade Veterinary Clinic, Inc. For purposes of this opinion, references to West Meade shall include both West Meade Veterinary Clinic, PC and Palmer-West Meade Veterinary Clinic, Inc. where appropriate.

At some time between September and December 1999, Palmer offered to sell West Meade to Dr. Truitt for $125,000.00 less whatever commissions and bonuses Dr. Truitt had accumulated. Dr. Truitt did not accept this offer. In either April or May 2000, Palmer asked Dr. Truitt to make an offer on West Meade. Palmer wrote in her notes at the time that Dr. Truitt had accumulated $17,267.26 "equity in practice so far." In July 2000, after performing a valuation of West Meade, Dr. Truitt offered Palmer $33,120.00 for West Meade and to forego any interest he may have accumulated in West Meade over the previous year. Palmer did not accept this offer. Instead, she offered to sell West Meade to Dr. Truitt for $50,000.00.

In July 2000, Palmer was approached by Dr. Michael Lutz ("Dr. Lutz"), a veterinarian, to buy West Meade's assets. Dr. Lutz offered to pay a total of $80,000.00 for the assets of West Meade.[2] Palmer approached Truitt on July 17, 2000, and stated that he had until six o'clock in the afternoon of that day to accept her offer of selling West Meade for $50,000.00 or she would be accepting Dr. Lutz's offer. Dr. Truitt did not accept the offer to purchase West Meade for $50,000.00, and, as a result, Dr. Lutz purchased the assets of West Meade for $80,000.00.

Palmer relinquished physical control of the premises for West Meade to Dr. Lutz and his wife, Dr. Michele Lutz, who is also a veterinarian; Drs. Michael and Michele Lutz had the locks changed for the West Meade office, preventing Dr. Truitt from entering on his own. Dr. Lutz agreed to employ Dr. Truitt for two weeks, but Dr. Truitt did not return to work at West Meade after August 12, 2000.

On March 13, 2001, Dr. Truitt filed a complaint against Palmer, West Meade, Drs. Michael and Michele Lutz, and West Meade Veterinary Clinic, LLC[3] (collectively, the "Defendants"). Dr. Truitt took a voluntary non-suit for all claims against Dr. Michele Lutz on September 6, 2001. Dr. Lutz subsequently filed a motion for partial summary judgment on the claims of defamation, breach of an employment contract, and conspiracy to interfere with Dr. Truitt's contract with Palmer; the trial court granted this motion, noting that Dr. Truitt did not oppose it. Dr. Truitt voluntarily dismissed all other claims against Dr. Lutz.[4] Palmer and West Meade filed a motion for partial summary judgment on May 15, 2002. The trial court granted this motion, leaving only Dr. Truitt's claim for unpaid commissions or bonuses for trial.[5] After a trial on the remaining issue, the lower court awarded Dr. Truitt $6,307.85, representing unpaid commissions owed. Dr. Truitt filed a notice of appeal with this Court and presents the following issues, as we perceive them, for our review:

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[2] Specifically, Dr. Lutz presented Palmer with an earnest money check of $5,000.00, a payment of $45,000.00, and agreed to place $30,000.00 in escrow to cover any bonuses or commissions owed to Dr. Truitt.

[3] After purchasing West Meade's assets, Dr. Lutz formed West Meade Veterinary Clinic, LLC.

[4] Drs. Michael and Michele Lutz and West Meade Veterinary Clinic, LLC are not parties to this appeal.

[5] Dr. Truitt moved the trial court for permission to file an interlocutory appeal with this Court. The trial court denied Dr. Truitt's motion.

I. Whether genuine issues of material fact existed as to whether Dr. Truitt had an agreement with West Meade to acquire an equity interest in West Meade in exchange for his services and how that interest was calculated; and

II. Whether Palmer misrepresented her status as a shareholder and president of a professional corporation when she herself was not a professional.

For the following reasons, we reverse and remand this cause to the trial court for further proceedings consistent with this opinion.

Standard of Review

Our supreme court has previously articulated the standard by which we review appeals of orders on summary judgment:

> In determining whether or not a genuine issue of material fact exists for purposes of summary judgment, courts in this state have indicated that the question should be considered in the same manner as a motion for directed verdict made at the close of the plaintiff's proof, i.e., the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991); *Poore*, 666 S.W.2d at 49; *Dunn*, 833 S.W.2d at 80; *Wyatt v. Winnebago Industries, Inc.*, 566 S.W.2d 276, 279 (Tenn. App. 1977); *Taylor*, 573 S.W.2d at 480. Then, if there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied. *Poore*, 666 S.W.2d at 49 ("If the mind of the court entertains any doubt whether or not a genuine issue exists as to any material fact it is its duty to overrule the motion."); *Dooley v. Everett*, 805 S.W.2d 380, 383 (Tenn. App. 1990). The court is not to "weigh" the evidence when evaluating a motion for summary judgment. *See Hamrick v. Spring City Motor Co.*, 708 S.W.2d 383, 389 (Tenn. 1986) ("Summary judgment is not ordinarily the proper procedure for determining whether a prima facie case has or has not been overcome by countervailing evidence."); *Rollins v. Winn Dixie*, 780 S.W.2d 765, 767 (Tenn. App. 1989). The court is simply to overrule the motion where a genuine dispute exists as to any material fact. *Dunn*, 833 S.W.2d at 80; *Dooley*, 805 S.W.2d at 383. The phrase "genuine issue" contained in Rule 56.03 refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts. *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 929 (Tenn. App. 1984). The critical focus is limited to facts deemed "material", *Evco*, 528 S.W.2d at 24-25, which is to say those facts that must be decided in order to resolve the substantive claim or defense at which the motion is directed. *Knoxville Traction Co. v. Brown*, 115 Tenn. 323, 331, 89 S.W. 319, 321 (1905); *Rollins v. Winn Dixie*, 780 S.W.2d 765, 767 (Tenn. App. 1989); *Schwarzer*, 139 F.R.D. at 476.

> Moreover, the cases make clear that the party seeking summary judgment must carry the burden of persuading the court that no genuine and material factual issues exist and that it is, therefore, entitled to judgment as a matter of law. *See, e.g., Downen*, 811 S.W.2d at 524; *Jones v. Home Indem. Ins. Co.*, 651 S.W.2d 213, 214 (Tenn. 1983); *Williamson Cty. Broadcasting v. W. Cty. Bd. of Ed.*, 549 S.W.2d 371, 372 (Tenn. 1977); *Taylor*, 573 S.W.2d at 480; *Lucas Brothers v. Cudahy Co.*, 533 S.W.2d 313, 316 (Tenn. App. 1975). Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 498 (Tenn. 1978); *Merritt v. Wilson Cty. Bd. of Zoning Appeals*, 656 S.W.2d 846, 859 (Tenn. App. 1983). In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth specific facts showing that there is a genuine issue of material fact for trial. "If he does not so respond, summary judgment . . . shall be entered against him." Rule 56.05. If the motion is denied, the moving party "has simply lost a preliminary skirmish and must proceed to trial." *Williamson*, 549 S.W.2d at 372.

Byrd v. Hall, 847 S.W.2d 208, 210-11 (Tenn. 1993). We review the materials before the trial court at the time it heard the motion for summary judgment. *See Reeves v. Thompson*, 490 S.W.2d 525, 527 (Tenn. 1973).

Law and Analysis

Appellant argues that the trial court erred when it granted the Appellees summary judgment on the issue of whether Appellant had an agreement to build up an equity interest in West Meade. It is Appellant's theory that Appellees agreed he would accumulate an equity interest each month and that such interest would increase at a rate of at least $1,500.00 per month but could exceed this amount due to bonuses. If the parties could not agree on a purchase price, the accumulated interest would be refunded to Appellant. Oral contracts are enforceable, but those seeking to enforce them must demonstrate that the parties mutually assented to the terms of the contract and that the terms are sufficiently definite to be enforceable. *Burton v. Warren Farmers Coop.*, 129 S.W.3d 513, 521 (Tenn. Ct. App. 2002) (citing *Davidson v. Holtzman*, 47 S.W.3d 445, 453 (Tenn. Ct. App. 2000); *Castelli v. Lien*, 910 S.W.2d 420, 426-27 (Tenn. Ct. App. 1995)). Therefore, whether the parties agreed to this provision and this rate of accumulation are facts which must be decided in order to resolve Appellant's claim, making them material facts. *Byrd*, 847 S.W.2d at 211 (citing *Evco Corp. v. Ross*, 528 S.W.2d 20, 24-25 (Tenn. 1975)). Whether the parties agreed to these terms is a genuine factual issue and does not involve any legal conclusions to be drawn from these facts. It is not the function of the trial court to weigh the evidence on a motion for summary judgment. On the contrary, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Byrd*, 847 S.W.2d at 212 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Further, it is not the province of the trial court on a motion for summary judgment to make credibility determinations. *Id.* (quoting *Anderson*, 477 U.S. at 255). In this case, it appears

the trial court credited the deposition testimony of Palmer over Dr. Truitt's deposition testimony. Therefore, given that this case involves genuine issues of material fact, we reverse the trial court's order granting summary judgment on Appellant's breach of contract claim, and we remand this cause for further proceedings consistent with this opinion.

We now turn to Appellant's concerns over whether Palmer had the authority to act as the president of a professional corporation, and thereby misrepresented her status as the president, pursuant to the Tennessee Professional Corporation Act codified at Tenn. Code Ann. § 48-101-601 *et seq*. The issue of whether Palmer violated the Tennessee Professional Corporation Act, and therefore lacked the authority to sell the assets of the corporation, does not appear in the complaint filed by the Appellant. Appellant filed a motion to amend his complaint, adding allegations of violations of the Tennessee Professional Corporation Act, but the trial court denied this motion. The determination of whether to allow an amendment to the pleadings is left to the discretion of the trial court; this Court will not reverse such a determination unless the trial court has abused its discretion. *George v. Bldg. Materials Corp. of Am.*, 44 S.W.3d 481, 486 (Tenn. 2001) (citing *Harris v. St. Mary's Med. Ctr., Inc.*, 726 S.W.2d 902, 904 (Tenn. 1987)); *see also Allen v. Saturn Corp.*, No. M2002-01238-COA-R3-CV, 2003 Tenn. App. LEXIS 638, at *5 (Tenn. Ct. App. Sept. 4, 2003) (citing *Welch v. Thuan*, 882 S.W.2d 792, 793 (Tenn. Ct. App. 1994)). Appellant does not argue that the trial court abused its discretion when it denied his motion to amend his complaint to add allegations of violating the Tennessee Professional Corporation Act, nor can we say, after reviewing the record, that the trial court abused its discretion. Further, the issue of whether Palmer violated the Tennessee Professional Corporation Act has not been considered by the trial court. Therefore, we decline to address this issue for the first time on appeal.[6] *See Lee v. Lee*, 66 S.W.3d 837, 846 (Tenn. Ct. App. 2001) (citing *State Dept. of Human Servs. v. Defriece*, 937 S.W.2d 954, 960 (Tenn. Ct. App. 1996); *Chadwell v. Knox County*, 980 S.W.2d 378, 384 (Tenn. Ct. App. 1998)).

Conclusion

We reverse the trial court's grant of summary judgment and remand for further proceedings consistent with this opinion. Costs of this appeal are taxed equally to Appellees, Stephanie Palmer, West Meade Veterinary Clinic, PC, and Palmer-West Meade Veterinary Clinic, Inc., and Appellant, Dr. Paul Truitt, and his surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE

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Appellant also argues that the trial court erred when it granted summary judgment on his claims for conversion and interference with a prospective economic advantage. However, Appellant phrases these arguments for reversing the trial court's grant of summary judgment on these claims in the context of Palmer's lack of authority to act for West Meade pursuant to the Tennessee Professional Corporation Act. Because the trial court did not consider any violation of the Act, we decline to address Appellant's arguments regarding the trial court's grant of summary judgment on Appellant's claims for conversion and interference with a prospective economic advantage.